In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1325

CLYDE H. HALE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 406 F. 2d 476.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 1969. A petition for rehearing was denied on March 17, 1969.[1] The petition for a writ of certiorari, filed on April 28, 1969, is out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] On April 7, 1969, the court of appeals recalled and stayed its mandate until April 27, 1969.

352-480—69

QUESTIONS PRESENTED

1. Whether it was improper to convict petitioner of perjury, because the deposition in which he made the allegedly perjurious statements was not signed by him and because it contained an apparent error in the certificate of the officer who administered the oath.

2. Whether petitioner's testimony in a civil contempt case admitting the falsity of the deposition could be used against him at his subsequent trial for perjury.

3. Whether the trial court erred in excluding certain evidence offered by the defense.

STATEMENT

After a jury trial in the United States District Court for the Western District of Oklahoma, petitioner was convicted on a one-count indictment for perjury in violation of 18 U.S.C. 1621 in a deposition made under oath before a notary public in connection with a civil case pending in a federal district court. On February 1, 1968, he was sentenced to fifteen months' imprisonment.

1. The evidence showed that during January 1966, petitioner, a lawyer in Oklahoma City, received, as trustee, the sum of $38,000 from Puerto Rican businessmen interested in obtaining mortgage financing for contemplated hospital construction in Puerto Rico (Tr. 136, 140, 154).[2] This money was to be held by

[2] The record on file with the Clerk of this Court consists of one volume. In order to conform to the transcript index, page references to the transcript, referred to herein as "Tr.", are to

petitioner while two Oklahoma mortgage brokers, Rogers and Kelley, sought to obtain mortgage commitments from lending institutions (Tr. 184). If they were successful, the money was to be paid to the lenders as a commitment or "standby" fee, and then Rogers and Kelley were to be paid a fee for their efforts in obtaining the loans (Tr. 188). If they were unsuccessful, the $38,000 was to be returned to the Puerto Rican businessmen, less reasonable expenses (Govt. Ex. 6; R. 451–452, 467).

Shortly after petitioner received the money, it was distributed among Rogers, Kelley and petitioner, with petitioner receiving approximately one-third (Tr. 110–121, 143–145, 188, 194). Rogers and Kelley regarded petitioner as an equal partner, not as their attorney (Tr. 145, 154, 206–207). A few weeks later, the mortgage commitments not having been obtained, the Puerto Rican businessmen sought return of the $38,000 (Tr. 145). Petitioner advised one of them, who was then staying at petitioner's home in Oklahoma, to sue for the return of the money (Tr. 278, 298, 300). On March 30, 1966, suit was filed in the United States District Court for the Western District of Oklahoma and petitioner, as trustee, as well as Rogers and Kelley and their company, were named as defendants (Govt. Ex. 1; R 413–418; Pet. 3–4).

On April 13, 1966, in connection with this civil suit, petitioner was called upon by plaintiff's counsel to

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the original transcript page numbers. Other page references in the record, referred to herein as "R.", use the consecutive pagination adopted when the transcript and other documents were incorporated in the one-volume record.

give a pretrial deposition (Govt. Ex. 6; R. 435–474). After he was sworn before a notary public, he stated that he had received the $38,000, and still retained the money in a safe deposit box, rented in his name, at a designated bank (Tr. 91–93, 95; R. 463). On May 5, 1966, the trial judge enjoined petitioner from making disbursement of the $38,000 which he claimed to be holding. On November 8, 1966, a default judgment was entered after petitioner failed to appear for trial, and he was ordered to pay the $38,000 to the plaintiffs (see Pet. 6).

Upon petitioner's failure to pay the money, a show cause contempt order was served upon him. In January 1967, as part of his response, petitioner filed an affidavit. In it, petitioner asserted that although he had received the $38,000 from Puerto Rico, he had paid that sum, minus $1.50, to Kelley and that at no time after the institution of the civil suit had he held any of the money (Tr. 223–224, Govt. Ex. 14; R. 520–521).[3] At the show cause hearing held late in January 1967, petitioner, who was represented by counsel (G. Ex. 16; R. 522), testified to the effect that he had received the $38,000 and had paid it to Kelley,[4] that

[3] Several months earlier (in October 1966), petitioner had consulted with an attorney, James George, concerning his deposition of April 1966. Mr. George advised petitioner to disclose fully to counsel in the civil suit that the earlier statement was false and himself did so on petitioner's authorization (Pet. App. vi, xxii).

[4] Petitioner obtained an undated receipt from Kelley for $38,000 (Govt. Ex. 13). Kelley testified that the receipt was obtained in September 1966 when he was about to be imprisoned on unrelated charges and after petitioner had indicated he would help Kelley's family during Kelley's absence (Tr. 146–148).

his April 1966 deposition statement that he was holding that sum in a safe deposit box was incorrect, and that he had never held such a sum on deposit and therefore could not transfer the money to the successful civil plaintiffs (Tr. 174–178; see Exhibit 16, R. 522–554). The civil contempt proceeding was then dismissed, and petitioner was subsequently indicted for perjury.

At the perjury trial, petitioner's affidavit of January 1967 and his testimony at the show cause hearing were introduced by the government (Tr. 171–177, 224, 288; see Pet. App. xv–xxii). Petitioner testified that he had acted as attorney for Rogers and Kelley (Tr. 266) and had given Kelley the $38,000 (Tr. 261, 291, 297). He stated that although he knew that the $38,000 was not in his safe deposit box, he had so testified at the deposition because of Kelley's assurance, given that morning, that the $38,000 would be "bank-wired" from Kelley's bank to the bank where petitioner had his safe deposit box (Tr. 281, 302–303).[5]

ARGUMENT

As noted above, the petition is out of time. In any event, it raises no issue of merit.

1. Prior to making their April 1966 depositions, petitioner and Rogers were sworn under the custom-

[5] Kelley, who testified as a government witness, denied telling petitioner he would have his bank transfer the funds (R. 165). Instead, Kelley testified that at the time petitioner gave his April 1966 deposition petitioner had told him: "I have testified I have the 38,000; you take the Fifth Amendment" (Tr. 163). Kelley did, at that time, refuse to testify on a claim of privilege.

ary witness oath by a Mrs. Nona Cline, who was a notary public and court reporter in Oklahoma. When petitioner thereafter failed to respond to the notice that his deposition had been transcribed and was ready for his signature, Mrs. Cline filed the deposition with the clerk of the district court, together with a copy of the unanswered notice that she had previously dispatched to petitioner (Tr. 82–86). Her certificate to the depositions stated that they were taken by her stenographically and after they were reduced to typewritten form, the "signatures thereto * * * were affixed by the witnesses; * * *" (Govt. Ex. 6; R. 484; Pet. App. x-xiii).

Petitioner argues that since he never signed his deposition, having reserved the right to do so (Pet. App. xi), it was error for the reporter to make her certificate and file the deposition with the court. When a deponent refuses to sign, however,—and in the present case the reporter testified to petitioner's failure to respond to notice to do so—a deposition may be used as fully as though signed by the deponent. See *Porter* v. *Seas Shipping Co.,* 20 F.R.D. 108 (S.D.N.Y.); Rule 30(e), F.R. Civ. P.; 4 Moore, *Federal Practice,* pp. 2116–2118 (2d ed. 1968). Between April 1966, when the deposition was taken, and the following November, when the default judgment was entered, petitioner made no objection to either the contents or the form of his deposition. By thus failing to object within a reasonable period of time, petitioner (a party to the civil case) waived any defects in the taking of the deposition. Rule 32(d), F.R. Civ. P. Moreover, the alleged defect in the reporter's cer-

tificate would not, in any event, be a defense to the perjury charge—it did not retroactively confer upon petitioner a license to lie with impunity under oath when his deposition was taken. See *United States* v. *Williams,* 341 U.S. 58, 67–69.

2. Petitioner's statements in his affidavit and at the contempt hearing, made in furtherance of his efforts to prevent his being held in contempt for refusing to turn over the $38,000, were properly admissible against him in the subsequent perjury trial. Petitioner was a practicing attorney, with many years of experience, who was represented by two additional lawyers (see Pet. App. iv); he was obviously familiar with his right to silence. Nonetheless, he freely submitted the affidavit admitting the false statements in the deposition and thereafter similarly testified. See *Black* v. *United States,* 353 F. 2d 885, 889, n. 1 (C.A.D.C.), certiorari denied, 384 U.S. 927, vacated on other grounds, 385 U.S. 26.[6]

Any dilemma confronting petitioner at the contempt hearing was of his own making. His situation is hardly comparable to that of a defendant who in order to establish standing to assert a Fourth Amendment right was required to testify at the suppression hearing, and thus in effect to waive his Fifth Amendment privilege against self-incrimination. Compare *Simmons* v. *United States,* 390 U.S. 377, 389–394.

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[6] The record of the contempt hearing at which petitioner testified (Pet. App. xvii–xxii) belies the claim that the district judge went beyond the bounds of proper inquiry. As the court of appeals pointed out, the record shows only a diligent effort by the court "to bring out all of the material facts" (Pet. App. iv-v).

Here, as the court of appeals pointed out, petitioner's filing of the affidavit and his testimony at the contempt hearing were tactics to avoid liability for contempt (Pet. App. iv). Moreover, it can fairly be said that he was already laying the foundation for a trial defense on a possible perjury or other criminal enarge. His admission that he had knowingly misstated the facts concerning his possession of the $38,000 was explained in his testimony at the contempt hearing as a consequence of his zeal as an attorney and his misplaced reliance upon Kelley. He said that he had in no way been enriched by his false statement. This explanation was repeated at the perjury trial, both in petitioner's testimony and in his counsel's closing argument (Tr. 281, 290, 302, 315–322, 325).

3. Petitioner argues that it was error to exclude the testimony of attorney George concerning his conversations with petitioner in October 1966, and his advice, in which petitioner acquiesced, that opposing counsel in the civil suit be advised that petitioner had made erroneous statements in the April 1966 deposition (Pet. 5, 9–10, 19; see Pet. App. xxxi–xxxv). The exclusion of this evidence could hardly have been prejudicial. If it was meant to show recantation, such evidence would have been irrelevant.

Petitioner's offense was complete when, after the oath was administered, he gave his false testimony. *United States* v. *Norris,* 300 U.S. 564, 574, 576. Since petitioner does not contend that he misunderstood the deposition questions, he could not purge himself by showing a recantation six months later. *United States* v. *Norris, supra.* If, on the other hand, Mr. George's

testimony was meant to show that petitioner was proceeding in good faith and had not intended to falsify, it was self-serving and remote.[7] The trial court did, in fact, permit petitioner to testify fully on the issue of his intent. In these circumstances, the court of appeals correctly ruled that the exclusion of Mr. George's testimony by the district judge was "within the range of his discretion" (Pet. App. vii).

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1969.

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[7] Nor was exclusion of the testimony unfair because the government was allowed to introduce evidence of petitioner's testimony at the civil contempt hearing, held during this same period of time (January 1967). The crucial difference is that the government's evidence was material in establishing the falsity of the deposition.

U.S. GOVERNMENT PRINTING OFFICE: 1969